International Brotherhood of Electrical Workers, Local Union No. 666 *and* Stokes Electrical Service, Inc. Case 5–CB–7925

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, AND HURTGEN

Upon charges filed on August 31 and October 19, 1994, by the Employer, Stokes Electrical Service, Inc., the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on October 27, 1994. The complaint alleges that the Respondent, International Brotherhood of Electrical Workers, Local Union No. 666 (the Respondent Union or the Union), violated Section 8(b)(1)(B) of the National Labor Relations Act by coercing the Employer in its selection of its bargaining representative by unilaterally invoking the interest arbitration clause contained in the 1992–1994 collective-bargaining agreements between the Union and the Virginia Chapter of the National Electrical Contractors Association (NECA) after the Employer had withdrawn both its assignment of bargaining rights to NECA and its recognition of the Union as the 9(a) bargaining representative of its employees. The complaint further alleges that the Union violated Section 8(b)(1)(B) of the Act by attempting to enforce the collective-bargaining agreements imposed by the resulting interest arbitration awards.

On June 8, 1995, the General Counsel, the Union, and the Employer filed a stipulation of facts. The parties agreed that the charge, the complaint, the Union's answer, and the stipulation of facts, including attachments, constituted the entire record in this case and that no oral testimony was necessary or desired. The parties further stipulated that they waived a hearing and findings of fact, conclusions of law, and the issuance of a decision by an administrative law judge. The parties agreed that the Board should issue its decision containing findings of fact and conclusions of law.

On July 26, 1995, the Board issued an order approving the stipulation and transferring the proceedings to the Board. Thereafter, the parties filed briefs.

On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is a corporation with an office and place of business in Richmond, Virginia, where it is primarily engaged as a commercial and residential electrical contractor in the construction industry. During the 12 months preceding the complaint and notice of hearing, the Employer purchased and received at its Richmond, Virginia facility goods valued in excess of $50,000 from other enterprises, including Graybar Electrical Supply, Dixie Electric, and General Electric Supply, all located within the State of Virginia, and each of which had received those goods directly from points outside of Virginia. We find that Stokes Electrical Service, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent Union admits, and we find, that it is now and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

The Employer, by virtue of signing two "Letters of Assent-A" on August 25, 1986, and March 11, 1991, authorizing the Virginia Chapter of NECA to act as its agent for the purposes of collective bargaining, became bound to a number of "Inside Construction" and "Residential" labor agreements between NECA and the Respondent Union, the most recent of which were effective by their terms from September 1, 1992, until August 31, 1994. Also, on March 11, 1991, on the basis of signed authorization cards, the Employer entered into an agreement for voluntary recognition of Local 666 as the exclusive bargaining representative of its employees. The 1992–1994 collective-bargaining agreements each contained an expiration clause with provisions for automatic annual renewal, absent changes or termination.[1] The agreements further provided for submission of unresolved issues in negotiations for adjudication by the Council on Industrial Relations (CIR) and for continuation beyond their anniversary dates until a conclusion was reached respecting proposed changes.[2]

[1] Art. I, secs. 1.01 provided as follows:

Section 1.01. This Agreement shall take effect September 1, 1992, and shall remain in effect through August 31, 1994, unless otherwise specifically provided for herein. It shall continue in effect from year to year thereafter from September 1 through August 31 of each year, unless changed or terminated in the way later provided herein.

[2] Art. 1, sec. 1.02 provided as follows:

Section 1.02. (a) Either party desiring to change or terminate this Agreement must notify the other in writing *at least 90 days prior to the anniversary date*.

(b) Whenever notice is given for changes, the nature of the changes desired must be specified in the notice.

(c) The existing provisions of the Agreement shall remain in full force and effect until a conclusion is reached in the matter of proposed changes.

(d) Unresolved issues in negotiations that remain in the 20th of the month preceding the next regular meeting of the Council on Industrial Relations, may be submitted jointly or unilaterally by the parties to this Agreement to the Council for adjudication prior to the anniversary date of the Agreement.

(e) When a case has been submitted to the Council, it shall be the responsibility of the negotiating committee to continue to meet weekly in an effort to reach a settlement on the Local level prior to the meeting of the Council.

On March 14, 1994,[3] the Employer withdrew NECA's authority to act as its bargaining agent, and on May 9, it timely served an 1.02(a) notification on Union Business Manager Harry F. Zahn of its desire to terminate the Inside and Residential agreements upon their expiration.[4] On June 2, Zahn hand delivered to the Employer a timely[5] written notification, under section 1.02(a) and (b), of the Union's intent to make changes in the existing Inside and Residential agreements; accompanying the notification were copies of proposed successor agreements with the desired changes set forth in italics. The Union's letter indicated that it was prepared to meet at the earliest mutually convenient time to negotiate a new agreement.

On June 13, the Employer informed the Union that it no longer believed that the Union represented a majority of its employees, and that it had filed a petition for an election to resolve the question concerning representation. The Employer filed a RM election petition (Case 5–RM–967) on June 14, and the Employer and the Union thereafter entered into a Stipulated Election Agreement providing for an election on August 2, which was approved by the Regional Director on July 6. An exchange of letters ensued in which the Union demanded that the Employer honor its statutory and contractual bargaining obligations, and in which the Employer refused on the grounds of its asserted reasonably based good-faith doubt of majority status. Then, on July 13, the Union filed an 8(a)(5) refusal to bargain charge against the Employer (Case 5–CA–24554). In addition, the Union invited the Employer to join with it in submitting their unresolved bargaining issues to the CIR for interest arbitration. The Employer declined to do so. At the Union's request, the CIR supplied the Union and the Employer with forms and instructions regarding procedures for submission of matters for adjudication before that body. The Employer replied to the CIR by stating that it doubted the Union's majority status, and asserting that absent a duty to bargain with the Union, the CIR lacked jurisdiction over the Employer.

Thereafter, on July 29, the Regional Director dismissed the refusal to bargain charge, finding that "the evidence shows the Employer's refusal to bargain is based upon a good-faith doubt of the Union's majority status." Subsequently, on August 5, the Regional Director dismissed the RM election petition, stating:

> [I]n view of the Employer's refusal to bargain with the Union, and my affirmation of that conduct by refusing to issue complaint in Case 5–CA–24554, the question concerning representation is moot.[6]

Neither party appealed the dismissal of the unfair labor practice charge nor requested review of the dismissal of the election petition.

Concurrently, the Union, on about August 1, unilaterally invoked section 1.02(d) of both the Inside and Residential agreements and submitted the bargaining dispute to the CIR for interest arbitration.

On about August 16, the CIR held a hearing, in which the Union alone participated,[7] and on the same date issued two unanimous preliminary CIR decisions (which were finalized on about August 31). These decisions stated that the CIR had decided to assert jurisdiction because, even assuming that the Employer had a good-faith doubt of the Union's majority status, "that alone would not relieve it of the *contractual* commitment which it entered into to have unresolved issues of negotiations, including a request for termination, to be adjudicated by the CIR." (Emphasis in original.) The decisions directed the parties to sign and implement the September 1, 1994,-November 30, 1996 Inside and Residential agreement, which were attached to, and made part of, the respective decisions.[8]

On August 31, Union Business Manager James Underwood[9] sent the Employer the new wage and fringe benefit rates of the Inside and Residential agreements that were to become effective on September 1, as part of the CIR's interest arbitration decisions. The Employer refused to comply with those new terms. Instead, it filed unfair labor practice charges against Local 666, which led to the General Counsel's issuance of the instant complaint.

On February 16, 1995, the Union filed an action which is currently pending in the United States District Court for the Eastern District of Virginia seeking to enforce the interest arbitration awards of the CIR.

> (f) Notice by either party of a desire to terminate this Agreement shall be handled in the same manner as a proposed change.

The CIR is a body created by NECA and the International Brotherhood of Electrical Workers that resolves contractual disputes in negotiations through interest arbitration. CIR rulings are made only by unanimous decision.

[3] Unless otherwise indicated, all dates are in 1994.

[4] The Employer's letter of termination of the multiemployer agreements ended with the sentence: "I will be in contact with you in the future to make arrangements for negotiating a new collective bargaining agreement."

[5] Stokes acknowledged receipt of the Union's notice as timely under sec. 1.02(a).

[6] The Regional Director noted that his approval of the Stipulated Election Agreement had preceded the filing of the charge in Case 5–CA–24554.

[7] The Employer, in response to a letter from the CIR extending its deadline for submitting a brief, submitted a brief reiterating its position that the CIR lacked jurisdiction because of the Regional Director's finding that the Employer had no duty to bargain with the Union over successor contracts.

[8] The CIR subsequently discovered and corrected a typographical error in both agreements.

[9] Underwood had succeeded Zahn as business manager of Local 666.

B. Contentions of the Parties

1. The General Counsel acknowledges Board authority in *Collier Electric*[10] and *Baylor Heating*[11] for the following proposition: a union generally will not be found to have committed an unfair labor practice by enforcing an interest arbitration clause in an expired collective-bargaining agreement against an employer, even when that employer has withdrawn bargaining authority from the multiemployer association that had negotiated the agreement, so long as the union can show that the clause was still arguably binding on the employer at the time of attempted enforcement. The General Counsel argues, however, that *Baylor* is inapposite because, unlike this case, it involved an 8(f) relationship, which may arise and may continue regardless of whether a majority of the employees in the relevant unit support the union. All that is needed is the agreement of both parties. A collective-bargaining contract imposed through an interest arbitration clause of an 8(f) agreement is thus deemed to be a further 8(f) agreement to which the parties agreed through their execution of the original contract containing the interest arbitration clause. While the union and the employer in *Collier Electric* had a 9(a) bargaining relationship, that case is distinguishable, the General Counsel argues, because, unlike here, there was no determination that the union had lost majority support before the attempt to impose a successor collective-bargaining agreement through the interest arbitration clause of the expired agreement. The General Counsel concludes that because the 1992–1994 agreements involved in this case were 9(a) agreements and because the Employer repudiated its 9(a) recognitional obligation on the basis of evidence of the Union's loss of majority support-a loss of majority status that the General Counsel alleges was established by the Regional Director's dismissal of the refusal-to-bargain charge filed against the Employer-the Union's attempt to impose a contract through the interest-arbitration clause was unlawful. It "violated Section 8(b)(1)(B) by coercing the Employer in its right to bargain through representatives of its own choosing," and violated Section 8(b)(1)(A) by attempting to impose the contract "upon employees it does not represent."

The General Counsel acknowledges, however, that the issues presented here are novel. He alternatively submits that a reasonable case may be made for dismissing the complaint on the theory that, since, in the construction industry, both 9(a) and 8(f) agreements are lawful, it is of no significance to the enforcement of an interest arbitration clause whether the bargaining relationship between the contracting parties has changed from 9(a) to 8(f) agreements at some time between the negotiation of the clause and the invocation of authority conferred by that clause to resolve the terms of a successor contract. Hence, the Union could reasonably argue that the interest arbitration clause was binding on the Employer even assuming the Union lost its majority status before seeking enforcement of the clause.

2. The Employer notes that its initial agreement with the Union was a prehire agreement under Section 8(f) and that the relationship changed to one governed by Section 9(a) in March 1991, by virtue of its recognition of the Union as its employees' exclusive bargaining representative with majority support. The Employer contends that its 9(a) relationship with the Union could not revert to an 8(f) relationship without the Employer's consent. It asserts that regardless of the nature of its relationship with the Union, no successor agreement could be imposed after the Regional Director had administratively determined that a majority of the Employer's employees had rejected union representation; and it argues that loss of majority is precisely the sort of circumstance referenced in the following statements in *Collier Electric*: "Deferral [to the courts to adjudicate the enforceability of the interest arbitration clause] might not be appropriate in every case"[12] and "We thus distinguish this situation from those involving, for example . . . alleged interference with individual employees' basic Sec. 7 rights."[13]

3. The Union argues that its attempt to enforce the interest arbitration clause through its submission to the CIR and the subsequent attempt to have the CIR awards enforced by the district court are lawful under *Collier Electric* and *Baylor*. It contends that the Employer's withdrawal of recognition on the basis of good-faith doubt of majority has no impact on purely contractual rights in the construction industry, because construction industry agreements may be entered into and enforced even in the absence of majority support. (The Union does not concede actual loss of majority support but accepts such a proposition for the purposes of its argument.) Only if a union were decertified in a Board election "conducted prior to expiration of the term of the otherwise applicable collective-bargaining agreement," the Union argues, would the interest arbitration provision be rendered "void and unenforceable."

C. Analysis

In *Collier Electric*, the Board held that a union does not necessarily commit an unfair labor practice by submitting bargaining issues to a tribunal for resolution under an interest arbitration clause and thereafter pursuing court enforcement of the interest arbitration award, even if the interest arbitration clause was contained in a multiemployer agreement negotiated by an association from

[10] *Electrical Workers IBEW Local 113 (Collier Electric)*, 296 NLRB 1095 (1989).

[11] *Sheet Metal Workers Local 20 (Baylor Heating),* 301 NLRB 258 (1991).

[12] 296 NLRB at 1099.

[13] Id. at fn. 20.

which the employer against whom interest arbitration is sought had timely withdrawn during the term of that agreement. The Board set out the following analytical framework (296 NLRB at 1098):

> First, we shall consider whether there is a reasonable basis in fact and law for the union's submission of unresolved bargaining issues to interest arbitration. In determining whether there is, we will decide whether the parties' collective-bargaining agreement arguably still binds a single employer, who has timely withdrawn from the multiemployer association, to the interest arbitration provision. If the collective-bargaining agreement at least arguably binds the employer to the provision, the union will be free to seek enforcement of its contractual rights by submitting the unresolved bargaining issues to interest arbitration, and by pursuing a Section 301 suit in court, without violating Section 8(b)(3) or Section 8(b)(1)(B) of the Act. On the other hand, if the agreement does not even arguably bind the employer to the arbitration provision, i.e., the contract contains language explicitly stating that an employer who has withdrawn from the multiemployer association is not bound to interest arbitration [for a successor contract], then the union's submission of the unresolved bargaining issues to interest arbitration would constitute bad-faith bargaining and coercion of the employer in the selection of its collective-bargaining representative, in violation of Section 8(b)(3) and Section 8(b)(1)(B).

The Board noted that in dismissing unfair labor practice charges under such an analysis it was merely standing aside to permit parties to enforce purely contractual rights; but it emphasized that an unfair labor practice might properly be found if the party submitting issues to interest arbitration had refused to bargain in good faith over those issues prior to their submission. Id.

Subsequently, in *Baylor Heating*, supra, the Board applied those same principles in a case involving an employer which had invoked its right, recognized in *John Deklewa & Sons*,[14] to repudiate its recognition of the union following expiration of an 8(f) agreement containing an interest arbitration clause. Even though 8(f) agreements require no showing of majority support for the union and therefore cannot impose a recognitional obligation on an employer after their expiration, the Board concluded that there was no reason that an employer could not be bound by its own agreement reflected in the interest arbitration clause to submit unresolved bargaining issues to interest arbitration for a successor agreement. *Baylor Heating*, supra, 301 NLRB at 260–261. Consequently, as in *Collier Electric*, the Board dismissed the complaint alleging that the union violated the Act through its attempted enforcement of the interest arbitration provision.

Contrary to the arguments of the General Counsel and the Employer, we do not view the present case as warranting a different result from *Collier Electric* and *Baylor Heating* simply because (1) the Union had been recognized as a 9(a) representative of the Employer's employees when the two agreements containing the interest arbitration clause were entered into and (2), before the Union invoked that clause, the Employer withdrew such recognition on the basis of good-faith doubt of majority support for the Union. Accordingly, for the following reasons we dismiss the complaint.

There is no dispute that the interest arbitration clause at issue in the present case is virtually identical to the clause at issue in *Collier Electric*. We therefore find, as in *Collier Electric*, that the clause, at least on its face, arguably binds the Employer to interest arbitration for a successor contract. There is no allegation that the Union bargained in bad faith prior to its submission of issues to interest arbitration. Moreover, the Union was not, at the time of its invocation of the interest arbitration clause, contending that the Employer was obligated to recognize it as a 9(a) representative; therefore, it was not attempting to use a contract secured through interest arbitration as a means of extending a 9(a) relationship.[15] It was merely, like the respondent union in *Baylor Heating*, exercising a contractual right to employ interest arbitration for a successor contract in the absence of mutual resolution of issues on the table for negotiation.

We stress, in any event, that there is no proof on this record that the Union had actually lost the majority status on which the original 9(a) recognition had rested. The Regional Director's administrative dismissal of the Employer's 8(a)(5) charge established only that he agreed with the Employer's contention that it had a good-faith doubt of the Union's majority status and that the Employer could thereafter decline to recognize and bargain with the Union without running afoul of Section 8(d) and Section 8(a)(5) of the Act. Even treating this administrative dismissal as a binding legal finding, however, we cannot properly equate it with a finding of actual loss of majority; that requires more than a finding that an employer has objective considerations for doubting a union's continuing majority support.[16] While a conclusive determination of employee support for the Union might have been obtained through an election conducted pursuant to the RM petition filed by the Employer, as noted in section A above, that petition was dismissed by the Re-

[14] 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3* v. *NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889–890 (1988).

[15] Thus, invocation of the interest arbitration clause cannot be fairly characterized as an attempt to circumvent the Regional Director's dismissal of its 8(a)(5) charge or to achieve by contract an effective recertification.

[16] *Auciello Iron Works*, 317 NLRB 364, 368 (1995), enfd. 60 F.3d 24 (1st Cir. 1995), affd. 116 S.Ct. 1754 (1996).

gional Director. Because neither party sought review of that dismissal, the propriety of that action is not before us. We therefore need not decide whether a different result would be warranted in this case had there been proof of an actual loss of majority support for the Union prior to its invocation of the interest arbitration clause.[17]

D. Conclusion

As set out above, we find that the collective-bargaining agreements arguably bound the Employer as a single employer to the contractual provisions for interest arbitration over any unresolved issues in bargaining for a successor contract. Accordingly, we find, on the basis of the principles set out in *Collier Electric* and *Baylor Heating*, supra, that the General Counsel has failed to establish that the Respondent Union had no reasonable basis for pursuing the unresolved bargaining issues through interest arbitration or for instituting legal action in court to enforce the resulting arbitration awards.[18] We therefore find that the Respondent did not violate Section 8(b)(1)(B) or Section 8(b)(1)(A) as alleged in the complaint, and we shall dismiss the complaint.

CONCLUSION OF LAW

1. Stokes Electrical Service, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent, International Brotherhood of Electrical Workers, Local Union No. 666, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(b)(1)(B) or (A) as alleged in the complaint.

ORDER

The complaint is dismissed.

MEMBER HURTGEN, dissenting.

I disagree with the majority positions in *Collier*[1] and *Baylor*,[2] and I agree with the dissents in those cases. A fortiari, I would not extend those precedents to cover the instant case.

In *Collier*, the employer and the union were part of a multiemployer unit. The contract in that unit provided for interest arbitration with respect to disputes arising out of the negotiation of the next contract. The employer withdrew from the multiemployer unit prior to the start of such bargaining. Notwithstanding this, the union sought interest arbitration to bind the employer to the new multiemployer contract. The General Counsel alleged that this union conduct was violative of Section 8(b)(1)(B). The Board dismissed. I agree with the dissent. In my view, the employer, when it was part of a multiemployer unit, had simply agreed to use interest arbitration with respect to disputes arising out of future negotiations in that multiemployer unit. It was unreasonable for the Union to assert that the employer agreed to use interest arbitration on a single-employer basis, i.e., with respect to disputes arising between the employer and the union after the employer had withdrawn from multiemployer bargaining.

The result in *Baylor* was also unsupportable. In that case, the relationship was based on Section 8(f) of the Act. The employer lawfully ended its bargaining relationship with the union at the end of that contract. In such circumstances, it was unreasonable for the Union to assert that the employer intended to be bound to interest arbitration after it had lawfully withdrawn recognition.

The instant result is similarly unsupportable. The Union was the Section 9 representative in a multiemployer unit. The Employer timely withdrew from that unit, and lawfully withdrew recognition from the Union. The latter act was privileged because the Employer had a good-faith doubt of the Union's majority status. In such circumstances, it is unreasonable for the Union to assert that the Employer intended to be bound by interest arbitration. In order to reach that result, one would have to conclude that the Respondent, having withdrawn from the multiemployer unit and having withdrawn recognition from the Union, nonetheless intended to be bound to interest arbitration for a new contract in a multiemployer unit.

[17] In particular, we need not decide whether the holding *in Sheet Metal Workers Local 162 (Dwight Lang's Enterprises)*, 314 NLRB 923, 928 fn. 19 (1994), that a union's loss of a Board-conducted election automatically voids any 8(f) agreement imposed through interest arbitration, should be extended to a case such as this. See also *Sheet Metal Workers Local 162 v. Jason Mfg.*, 900 F.2d 1392, 1399–1400 (9th Cir. 1990) (finding contract imposed through interest arbitration void after the union's decertification, but not void ab initio).

[18] No one has contended in this proceeding that any provision in the collective-bargaining agreements imposed by the interest arbitration tribunal was unlawful. See generally *Collier Electric*, supra, 296 NLRB at 1097.

[1] *Electrical Workers IBEW Local 113 (Collier Electric)*, 296 NLRB 1095 (1989).

[2] *Sheet Metal Workers Local 20 (Baylor Heating)*, 301 NLRB 258 (1991).